Coca-Cola Bottling Company Southeast, Inc. ***and*** **Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, AFL–CIO.** Case 10–CA–26529

May 9, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 14, 1993, Administrative Law Judge Howard I. Grossman issued the attached decision. The Charging Party filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Edward A. Smith, Esq., for the General Counsel.
Andrew C. Partee Jr., Esq. (Chaffe, McCall, Phillips, Toler & Sarpy), of New Orleans, Louisiana, for the Respondent.
Michael A. Kendrick, Business Agent, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on February 1, 1993, by Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Union), and complaint issued on March 18, 1993. As amended at the hearing, the complaint alleges that Coca-Cola Bottling Company Southeast, Inc. (Respondent, or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Brian Williams on September 2, 1992, because of his concerted activities with other employees for mutual aid and protection.[1]

A hearing was held before me on these matters on May 28, 1993, in Florence, Alabama. Thereafter, the General Counsel and the Respondent filed briefs. On the entire record, including my observation of the demeanor of the witnesses, I make the following

[1] The complaint originally alleged that the Respondent's asserted actions were violative of Sec. 8(a)(3) as well as Sec. 8(a)(1). The 8(a)(3) allegation was deleted by the General Counsel at hearing.

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish and I find that the Company is an Alabama corporation with an office and place of business at Florence, Alabama, where it is engaged in the maintenance and distribution of Coca-Cola products. During the calendar year immediately preceding issuance of the complaint, a representative period, the Company purchased goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Alabama. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The pleadings also establish that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Summary of the Evidence*

The Union had a succession of collective-bargaining agreements with the Company since 1950, the most recent of which expired on April 8, 1992. Pursuant to these agreements the Company recognized the Union as the representative of its employees in an appropriate unit. Brian Williams was employed on July 19, 1990, was part of the employee unit, and ''ran a conventional route.''

The Union began an economic strike on July 23, 1992, after 5 months of negotiations. The strike was continuing at the time of the hearing. The Union engaged in picketing, in which Williams participated.

Williams was discharged by letter dated September 2, 1992, because of certain events alleged to have taken place on August 27, 1992.[2]

Company President Robert G. Carroll testified that the Company had been paying $3000 to $5000 monthly in tire repairs to the Tom Smith Tire Company during the strike, because of nails in the driveway. Bryan Montgomery, one of the strikers called as a witness by the General Counsel, testified that there had been a number of flat tires involving Coca-Cola trucks, and that he ''saw the Tom Smith tire truck going in and out of that plant day after day.'' The Company developed an electromagnet to pick up nails in the driveway, just before the events of this proceeding.

Carroll testified that he could not sleep during the night of August 26–27. He arose early, and arrived at the plant at 4:25 a.m. It was still dark when Carroll arrived and he carried a flashlight. He had arranged for Route Superintendent William Eckl to meet him.

Trucks entered the Coca-Cola premises through a gate located at the north side of the plant, on Limestone Street. This area was illuminated by a Coca-Cola sign on top of the building, by spotlights, and by lights from an Amoco station and store across the street. Sunrise did not take place until after 6 a.m.

Carroll testified that he ''pulled onto Limestone Street at the entranceway'' at 4:25 a.m., shined his flashlight ''through the gate,'' and spent 10 minutes examining the

[2] The foregoing facts were stipulated by the parties.

driveway, the edges of the sidewalk, and around the gate area. Carroll testified: ''I could see no nails.'' He then went for breakfast on Florence Boulevard.

Carroll returned to the plant between 5:15 and 5:30 a.m. Because strikers were then present on Limestone Street, Carroll entered the plant through an entrance on another street, walked through the plant, and stood near a truck inside the Limestone Street gate. Eckl was with him by this time. Although the route superintendent estimated his time of arrival as about 5:45 a.m., Carroll stated that Eckl arrived at about 5:25 or 5:30. They stood about 100 to 110 feet from the gate.

Carroll identified a photograph which, he stated, was taken from the position where he and Eckl were standing on the morning of August 27.[3] The photograph looks outward from the plant toward Limestone Street and the Amoco station on the other side. This exhibit shows the slope of Limestone Street. Together with another photograph,[4] it also shows that the entranceway slopes downward in another direction from the gate into the plant area, at a right angle to Limestone Street. Both of these declinations were called ''hills'' by some of the witnesses.

At about 5:35 a.m., according to Carroll, he saw Brian Williams leave the group of strikers, about 15 feet from the gate, and walk down Limestone Street to the gate, which was closed at the time. Williams was carrying a picket sign in his right hand. Carroll could not then see Williams' left hand. Williams placed the picket sign near a yellow guard post, and, with his left hand, threw nails through the chain link netting of the gate onto the driveway. ''I saw them when they left his hand,'' Carroll testified. He also stated that the nails made a ''tinkling sound'' when they went through the chain link netting, and a ''clicking sound'' as they hit the blacktop of the driveway.

Carroll affirmed that he immediately turned his flashlight on, shined it at Williams at the gate, and said, ''Brian, I saw what you did I've got you.'' Carroll stated that he said this loud enough for Williams to hear him. Carroll testified that he walked up to the gate and found a nail.

Eckl, who had been a union member before he became a supervisor, corroborated Carroll. Williams was carrying a sign in his right hand. His left hand was stationary. After Williams placed the sign against the guard post, Eckl saw Williams' hand go up and saw ''objects flying in the air because of the light from the Amoco station.'' He heard two sounds, the first when the objects hit the fence, and the second when they struck the framing of the gate. Carroll turned his flashlight on, and said to Williams, ''Gotcha,'' or words of similar meaning. Eckl found two nails on the driveway. Respondent's counsel represented that the Company gave nine similar nails, picked from the driveway that morning, to the Board.[5] Carroll testified that he, Eckl, and the police picked up 15 nails. One of the nails was identified at the hearing. It was a ''roofing nail'' about an inch and a quarter in length. Eckl testified that it was long enough to cause damage to the Company's truck tires.

[3] R. Exh. 1.

[4] R. Exh. 3.

[5] It is unclear whether the General Counsel stipulated to this.

Carroll further testified that he then unlocked the gate, walked up to the group of strikers, including Williams and the union steward, and stated:

> Gentlemen, we can do this two ways. If y'all promise not to do it, come help me pick up the nails, there will be no problems with it. If you don't want to do that, I have no choice but to call the police.

There was no response. Carroll instructed Eckl to call the police, who arrived a few minutes later. According to Bryan Montgomery, they talked to Williams.

Montgomery was the first of the pickets to arrive that morning, at about 5 a.m. He testified that he stood about 15 feet from the gate on Limestone Street. During the next 30 minutes, about eight or nine pickets gathered at the same location. Williams arrived about 5:30, dropped some cardboard signs by the group of pickets, and walked down to the gate, carrying a metal sign. He was the only picket to walk past the gate, and none of them walked around the building.

As Williams walked down the hill, Limestone Street was on his left, and the company fence was on his right. Montgomery testified that Williams was carrying the metal sign with one hand, swinging it beside him, but could not remember whether it was the hand nearest the street or the hand next to the company fence. Williams' back was towards Montgomery. The latter denied that he saw Williams carry anything other than the sign, or throw any nails. He could not remember anything about Williams' hand which was not carrying the sign.

Montgomery stated that he saw a flashlight in the ''parking lot,'' and saw Carroll and Eckl ''walking through the trucks.'' Carroll came up to the pickets, shined the flashlight over the group, and said that the matter would be over if the pickets would pick up the nails. Otherwise, he would call the police. There was no response, and Carroll instructed Eckl to call the police.

Williams testified that he arrived at about 5:30 a.m. He dropped some cardboard picket signs near the pickets, and walked about 15 feet down to the gate, where he placed the metal sign against the guard post. Williams denied throwing any nails on the driveway, or making a throwing motion. He testified that he saw Carroll ''coming up the hill'' behind the gate, with a flashlight. After several questions on cross-examination, Williams agreed that Carroll then shined the flashlight on him. Williams denied on direct examination that Carroll said anything to him, but on cross-examination could not recall whether Carroll then said something that Williams could not understand. He also saw Route Superintendent Eckl.

Williams then returned to the group of pickets, and walked across the street to the Amoco store to get doughnuts for them. He did not pass the gate again on returning to the pickets. As he returned, Williams observed Carroll unlocking the gate and shining his flashlight on the ground.

The remainder of Williams' testimony on these events is similar to that of Carroll and Montgomery. He acknowledged that he was present in the group of pickets when Carroll spoke to them. Montgomery testified that Carroll ''passed the flashlight beam over the group.'' However, Williams stated: ''He had the flashlight on me.'' Williams made no answer to Carroll's statement.

Eckl worked the rest of the day after these events. He went with a trainee in a company truck to a customer in Waynesboro, a town about 35–40 miles away. According to Eckl, Williams and Montgomery followed them in another vehicle. When Eckl and the trainee got to Waynesboro, they went into a restaurant. Williams and Montgomery entered the same restaurant. After breakfast, Eckl asked Williams and Montgomery whether he could get them anything. ''Yeah,'' Williams replied, ''a lawyer.''

Williams agreed that he and another person ''followed'' Eckl and a ''strike replacement'' to Waynesboro. He had done this previously, Williams stated, although no reason for this action was advanced. Williams did not recall any conversation with Eckl, or telling him to get Williams a lawyer.

The Respondent discharged Williams by letter a few days later.[6]

B. *Factual and Legal Conclusions*

The Respondent's evidence, as corroborated by the General Counsel's witness, Bryan Montgomery, establishes that the Company had numerous flat tires because of nails in the driveway during the strike, and thereby sustained repair costs.

Company President Carroll testified without contradiction that he pulled onto the Limestone Street driveway at 4:25 a.m. on August 27, and that there were no nails in the driveway at that time.[7] I credit Carroll's testimony. Williams arrived at about 5:30 a.m., and, after putting some cardboard signs down near a group of pickets, walked down to the gate carrying a metal picket sign. Williams was the only picket to walk past the gate according to the General Counsel's witness, Bryan Montgomery. The latter was the first picket to arrive that morning.

Williams placed the metal sign next to the guard post. The evidence is in conflict as to whether he then threw nails through the netting of the closed gate onto the driveway. The General Counsel argues that the artificial illumination was insufficient to permit Carroll and Eckl to see Williams throwing nails through the gate netting about 100 feet away.[8] He also questions Carroll's capacity to see, because Carroll reads with a magnifying glass.[9] However, Carroll testified that this did not affect his ability to see at a distance, and offered to identify judges whose pictures appeared on the courthouse wall behind counsel for the General Counsel.[10] No visual incapacity was attributed to Eckl. Carroll used a flashlight in addition to the artificial illumination. It is undisputed that Williams was at the gate, and that there were nails in the driveway thereafter. I credit Carroll's testimony that he shined a flashlight on Williams, and said, loud enough for Williams to hear, ''I've got you.''

The testimonies of all the witnesses establish that Carroll then unlocked the gate and walked up to the group of pickets, including Williams. He told them that there were two ways to go, that they could help him pick up the nails, and promise not to do it again, or he would call the police.[11] There was no response from any of the pickets.

It is also undisputed that Williams and Montgomery followed Route Superintendent Eckl and a trainee to a town about 35–40 miles away. No reason for this following was advanced by Williams or Montgomery. They also followed Eckl and the trainee into a restaurant. I credit Eckl's testimony, not directly rebutted by Williams, that he asked the latter whether he could get him anything, and that Williams replied, ''Yeah, a lawyer.''

On the crucial issue of whether Williams threw nails through the netting of the gate onto the driveway, the testimonies of Carroll and Eckl were more detailed and believable than those of Williams and Montgomery. Thus, both Carroll and Eckl specified that Williams carried the picket sign in his right hand, whereas Montgomery did not know, and Williams was not specific. Carroll's and Eckl's descriptions of the ''tinkling'' sound (Carroll's phrase) of nails going through the gate netting, and the second sound when they hit the driveway blacktop or the gate framework, are strikingly similar and have the ring of verisimilitude.

There were no nails at 4:25 a.m., but some were present about an hour later after Williams' visit to the gate area. According to Montgomery, Williams was the only picket to visit this area. Montomery was the first picket at the site. This constitutes circumstantial evidence that it was Williams who was responsible for the nails on the driveway.

I credit Williams' testimony that Carroll directed the flashlight beam on Williams during his statement to the group of pickets and then said that there were two ways the matter could be resolved. Although Carroll did not specifically name Williams at this point, Williams knew that Carroll was shining the flashlight on him, and that it was he who had been down to the gate area a few minutes before. Carroll's statement, together with his action directing the flashlight on

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[6] The letter, dated September 2, 1992, reads:

> On August 27, 1992, at 5:35 a.m., you were observed by two witnesses (i.e., myself and Bill Eckl) as follows:
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> You walked east on the sidewalk on the north side of our building (i.e., Limestone Street). You leaned your picket sign on the yellow post by our gate. From your left hand you threw a handful of nail (sic) across the entrance to our facility. At that point, I turned on my flashlight I was holding in order to positively identify the perpetrator. You were identified by both Bill Eckl and me. I unlocked the gate and found the used roofing nails that you had strewn across the driveway. At that time, I told you that ''we can do this two ways. You can help me pick up the nails, or I will call the police.'' You did not respond. I asked Mr. Eckl to call the police which he did. At the time the police arrived, you denied having thrown the nails.
>
> Because you were observed in the act of placing nails in our driveway with the obvious intent of destroying company property (e.g., tires on incoming cars and trucks), then denying same, you are hereby discharged from the employment of Coca-Cola Bottling Company S.E., Inc., effective immediately for violation of work rules and for strike misconduct. Your action was willful, deliberate, and extreme in nature, obviously detrimental to Coca-Cola Bottling Co., S.E. By Copy of this letter to Hugh Gresham, I am notifying your union representative of same. [R. Exh. 6.]

[7] The General Counsel argues that Carroll ''did not indicate whether he was able to see any nails.'' G.C. Br. at p. 4. This is contrary to Carroll's clear testimony.

[8] G.C. Br. at p. 11.

[9] Ibid.

[10] The offer was not accepted.

[11] Although the Company's letter of discharge to Williams avers that Carroll made this statement to Williams at the gate after turning the flashlight on him, I conclude that the mutually consistent testimonies of all the witnesses have greater probative weight, and that the statement in the letter was an inadvertent error.

Williams, was a tacit accusation that Williams had thrown the nails on the driveway. Further, I have found that a few minutes before, at the gate area, Carroll said ''I've got you,'' and that Williams heard it.

Williams' failure to respond has evidentiary significance. The rule has been stated as follows:

> It is well settled that admissions may be implied from the mere silence of a party. Thus, the declarations made by one party to the other relative to the subject matter in controversy, and not denied by the latter, may be admissible against the silent party if the circumstances were such that a reply of denial would normally be expected.[12]

Williams said nothing to Carroll at the gate after Carroll's first statement. Since Carroll was shining the flashlight in Williams' face in the group of pickets, and making statements about nails and calling the police, a denial from Williams would normally be expected. His silence, although by no means determinative, has probative weight and tends to indicate that he did in fact throw the nails onto the driveway. To the same effect was Williams' answer to Eckl to get him a lawyer.

On the basis of all the foregoing, and the fact that Carroll and Eckl impressed me as trustworthy witnesses, I conclude that Williams did in fact throw nails on the Limestone Street driveway early in the morning of August 27, 1992. This constitutes misconduct warranting discharge. *Columbia Portland Cement Co*., 294 NLRB 410, 420 (1989).[13] Accordingly, I shall recommend that the complaint be dismissed.

In accordance with my findings, I make the following

CONCLUSIONS OF LAW

1. Coca-Cola Bottling Company Southeast, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs and Sales Drivers, Teamsters Local Union No. 402, affiliated with the International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not committed any unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed in its entirety.

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[12] Jones, *Evidence* (6th ed. p. 524 1972).

[13] The Respondent discusses *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1951), and *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). R. Br. at p. 10. Both of these cases consider the legal implications when an employee is not guilty of misconduct. Inasmuch as I have concluded that Williams was guilty of alleged misconduct, I consider it unnecessary to discuss these cases.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.